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No.

IN THE

Supreme Court of the United States

KATHLEEN EVANS, as Conservator of
JESSICA EVANS, a protected person,

Petitioner,

v.

LEDERLE LABORATORIES, LINK CLINIC
and O. SHARMA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the National Childhood Vaccine Injury Act, ("Act") 42 U.S.C. § 300aa-1, *et seq.*, preempt state rules of procedure which operate to prevent a plaintiff electing to reject an award under 42 U.S.C. § 300aa-11(a)(2)(A)(i) and 300aa-21(a) from recommencing civil proceedings.

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Petitioner, Kathleen Evans, as Conservator of Jessica Evans, a protected person, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit rendered in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Evans v. Lederle Laboratories, et al.*,167 F.3d 1106 (1999) (App. A at 1a). The Order of the United States District Court for the Central District of Illinois, Peoria Division, in *Evans v. Lederle Laboratories, et al.*, is published at 904 F. Supp. 857 (1995) (App. B at 18a).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its Opinion on February 3, 1999. A petition for rehearing was timely filed on February 19, 1999. The petition was denied on April 30, 1999. (App. D at 30a).

STATUTORY PROVISIONS INVOLVED

This case involves the National Childhood Vaccine Injury Act, 42 USC, § 300aa-1, *et seq*. and a "one refiling rule" that is a judicially created doctrine engrafted onto Illinois rule of procedure 735 ILCS 5/13-217.

From a policy standpoint the entire National Childhood Vaccine Injury Act is relevant, however, the specific procedural provisions of the Act germane to this petition are as follows:

1. **Section 300aa-11(a)(5)(A) and (5)(B)**

(5)(A) A plaintiff who on the effective date of this subpart has pending a civil action for damages for a vaccine-related injury or death may, at any time within 2 years after the effective date of this subpart or before judgment, whichever occurs first, petition to have such action dismissed without prejudice or costs and file a petition under subsection (b) of this section for such injury or death.

(5)(B) If a plaintiff has pending a civil action for damages for a vaccine-related injury or death, such person may not file a petition under subsection (b) of this section for such injury or death.

2. **Section 300aa-16(c)**

(c) State Limitations of actions

If a petition is filed under section 300aa-11 of this title for a vaccine-related injury or death, limitations of actions under State law shall be stayed with respect to a civil action brought for such injury or death for the period beginning on the date the petition is filed and ending on the date (1) an election is made under section 300aa21(a) of this title to file the civil action, (2) an election is made under section 300aa-21(b) of this title to withdraw the petition, or (3) the petition is considered withdrawn under section 300aa-21(b) of this title.

3. **Section 300aa-21(c)**

(c) Limitations of actions

A civil action for damages arising from a vaccine-related injury or death for which a petition was filed under section 300aa-11 of this title shall, except as provided in section 300aa-16(b) of this title, be brought within the period prescribed by limitations of actions under State law applicable to such civil action.

4. **Section 300aa-22(e)**

(e) Preemption

No State may establish or enforce a law which prohibits an individual from bringing a civil action against a vaccine manufacturer for damages for a vaccine-related injury or death if such civil action is not barred by this part.

The Illinois statute involved is as follows:

1. **735 ILCS 5/13-217**

Reversal or dismissal. In actions specified in Article XIII of this Act or any other act or contract where the time for commencing an action is limited, if judgment is entered for the plaintiff but reversed on appeal, or if there is a verdict in favor of the plaintiff and, upon a motion in arrest of judgment, the judgment is entered against the plaintiff, or the action is voluntarily dismissed for

want of prosecution, or the action is dismissed by the United States District Court for lack of jurisdiction, then, whether or not the time limitation for bringing such action expires during the pendency of such action, the plaintiff, his or her heirs, executors or administrators may commence a new action within one year or within the remaining period of limitation, whichever is greater, after such judgment is reversed or entered against the plaintiff, or after the action is voluntarily dismissed for want of prosecution, or the action is dismissed by a United States District Court for lack of jurisdiction.

STATEMENT OF THE CASE

The question presented in this petition is whether the National Childhood Vaccine Injury Act preempts state statutes of limitation that prevent a person from bringing a post-election civil action for vaccine-related injuries. The Illinois judicially-created "one refiling rule" in this instance was used to deprive petitioner from bringing a civil action after she elected to reject an award under the National Childhood Vaccine Injury Act. The opinion below is contrary to the plain language contained in the Act and it undermines the purpose the Act was intended to serve.

A. Overview Of The National Childhood Vaccine Injury Act

The National Childhood Vaccine Injury Act was passed by Congress on November 14, 1986. As stated in the opinion below, the Act was designed to provide "a no-fault compensation system for individuals harmed by childhood

vaccines." The Act established a compensation fund financed by a tax on vaccines. Persons alleging that they had sustained injuries from a vaccine could seek compensation from the fund by filing a petition in the United States Claims Court naming the Secretary of Health and Human Services as respondent.[1] Compensation was awarded if an injury was proven to be causally linked to the administration of a vaccine.

In creating the Act Congress recognized and identified three distinct groups of injured persons. First, there were persons who alleged injury from vaccines administered prior to the Act and who, prior to the Act, had commenced civil actions. Second, there were persons who alleged injury from vaccines administered prior to the Act but who, as of the time the Act was passed, had not yet commenced civil actions. Third, there were persons who alleged injury from vaccines administered after the Act was passed.

Under the Act persons in the first group were encouraged to dismiss their civil actions *without prejudice* and proceed with a petition in the United States Claims Court. If they were dissatisfied with the remedy afforded in the United States Claims Court they could then elect not to accept the decision and they could resume their civil actions. As to the second group, they could either commence a civil action or seek a remedy under the Act by filing a petition in the United States Claims Court. Persons in the second group who chose to first commence a civil action could not thereafter avail themselves of a remedy under the Act. Finally, as to persons in the third group, under the Act they could not commence civil actions without first pursuing a remedy in the United States Claims Court. Persons in group three could still commence civil actions but only after they had exhausted the procedures in the United States Claims Court.

1. Now called the United States Court of Federal Claims.

Petitioner fell into the first group in that her DPT vaccine was administered prior to the Act and a civil action had been commenced prior to the Act. To file a claim under the Act, petitioner was required to dismiss her pending civil action. 42 U.S.C. § 300aa-11(a)(5)(A).

B. Background and Proceedings Below

1. *The Parties*

Jessica Evans is profoundly disabled as a result of an encephalopathy. There is evidence that she experienced an adverse reaction upon administration of her initial DPT vaccination. The vaccine was manufactured by Lederle Laboratories and administered by Dr. O. Sharma at the Link Clinic.

2. *State Court Proceedings*

By other counsel, a malpractice suit was initially filed on August 14, 1985 on behalf of Jessica Evans in the Circuit Court of Cook County, Illinois. The suit named Dr. O. Sharma and the Link Clinic and various other defendants. Lederle Laboratories was not a defendant nor was any claim made for a vaccine-related injury. The suit was transferred to the Circuit Court of Coles County, Illinois. Thereafter petitioner's present counsel became involved. The case was voluntarily dismissed on July 14, 1988.

3. *Federal District Court Proceedings*

A new suit (Cause No. 88-3191) naming the present defendants Dr. O. Sharma, the Link Clinic, and Lederle Laboratories was timely filed on June 22, 1988, in the United

States District Court for the Central District of Illinois. Jurisdiction was based on diversity. 28 U.S.C. § 1332. The new suit focused on evidence that suggested that Jessica Evans' encephalopathy was caused by the DPT vaccine. This possibility had been uncovered during the course of pretrial proceedings in the initial state court case.

Cause No. 88-3191 was assigned to Judge Richard Mills. On August 24, 1990, plaintiff filed a "Motion to Dismiss *without prejudice* so as to allow proceeding under the National Childhood Vaccine Injury Act." (App. C at 27a). The motion was allowed on August 28, 1990.

Lederle had encouraged the voluntary dismissal both informally, through correspondence with petitioner's counsel, and also in pleadings. At all times relevant Lederle encouraged petitioner to seek a remedy under the National Childhood Vaccine Injury Act.

Dr. Sharma and Link Clinic objected to the voluntary dismissal. They sought to have the case dismissed *with prejudice* or alternatively that they be awarded their attorneys' fees and costs. The court did not grant either request and instead granted a voluntary dismissal *without prejudice.*

None of the defendants appealed the voluntary dismissal *without prejudice* granted by the court.

4. *Proceedings Pursuant to the National Childhood Vaccine Injury Act*

After having satisfied the statutory prerequisite of dismissing her civil action, petitioner proceeded to timely

file a petition in the United States Claims Court pursuant to the National Childhood Vaccine Injury Act. As was required, the Secretary of Health and Human Services was the sole respondent. Approximately 4-1/2 years later the petitioner and the respondent entered into a joint stipulation to dismiss the matter. This was a process permitted under the Act. 42 U.S.C. § 300aa-17. The stipulation was allowed. The petition was dismissed on January 31, 1995.

5. *Recommencing Civil Proceedings in Federal District Court*

Thereafter on February 28, 1995, the petitioner timely filed the instant case which, rather than being assigned to Judge Mills, was assigned instead to Judge Michael Mihm. On October 31, 1995 Link Clinic and Dr. O. Sharma were dismissed by Judge Mihm after they filed a Motion to Dismiss asserting that petitioner's cause of action was barred by 735 ILCS 5/13-217. Thereafter on January 28, 1998 Judge Mihm granted a judgment on the pleadings in favor of Lederle. The sole basis for dismissal raised by Lederle was 735 ILCS 5/13-217.

On appeal a panel of the Seventh Circuit Court of Appeals affirmed both of Judge Mihm's dismissal orders holding that the "one refiling rule" judicially engrafted onto 735 ILCS 5/13-217 was not preempted by the National Childhood Vaccine Injury Act.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW IS CONTRARY TO THE EXPRESS PROVISIONS OF THE NATIONAL CHILDHOOD VACCINE INJURY ACT.

The petition for writ of certiorari should be granted because the opinion below disregards the plain language of the National Childhood Vaccine Injury Act. The opinion below contravenes the plain language of the Act by applying the Illinois judicially-created "one refiling rule" engrafted to 735 ILCS 5/13-217 to extinguish what would otherwise be an entirely proper cause of action.

This Court has stated that "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy. *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) *quoting Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 221 (1986) *quoting Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956) *in turn quoting United States v. Heirs of Boisdore*, 8 How. 113, 122 (1949). Courts are instructed to "give effect, if possible, to every clause and word of a statute." *United States v. Menasche*, 348 U.S. 528, 538-539 (1955). Further, "in construing a statute, courts should attempt not to interpret a provision such that it renders other provisions of the same statute inconsistent, meaningless or superfluous." *Wells v. Secretary of the Department of Health and Human Services*, 28 Fed. Cl. 647, 660 (1993) *quoting Boise Cascade Corp. v. United States E.P.A.*, 942 F.2d 1427, 1432 (9th Cir. 1991). As this Court has so eloquently stated:

> [w]ords are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all their aggregate take their purport from the setting in which they are used. *King v. Saint Vincent's Hosp.*, 502 U.S. 215 __ (1991) (Souter, J.) *quoting NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.)

In reviewing the National Childhood Vaccine Injury Act, each section must be construed "in connection with all the sections so as to produce a harmonious whole." *Wells v. Secretary of the Department of Health and Human Services*, 28 Fed. Cl. 647, 661 (1993). The relevant sections of the Act read as a whole support a finding that the Act preempts state statutes of limitations that prevent a petitioner from commencing a post-election civil action to recover for a vaccine related injury.

Under 42 U.S.C. § 300aa-11(a)(5)(A) in order to file a vaccine claim a prospective claimant is required to dismiss a pending civil action. The dismissal is to be *without prejudice*. (emphasis added). The motion to dismiss filed by petitioner in Cause No. 88-319, which was granted by the trial court, specifically referenced that the dismissal was being sought *without prejudice* pursuant to 42 U.S.C. § 300aa-1 *et seq*. The *without prejudice* nature of the dismissal was fully ratified by the trial court. (App. C at 29a). Defendants Sharma and Link Clinic contested the *without prejudice* aspect of the dismissal but thereafter took no appeal. Defendant Lederle did not contest the dismissal at all and in fact encouraged it so that proceedings under the Act could be commenced. In fact, Lederle is on the record in the proceedings below as having characterized proceeding under the Act as a "no lose option for the minor plaintiff."

Under 42 U.S.C. § 300aa-16(c) statutes of limitations are tolled during the pendency of a petition. Pursuant to 42 U.S.C. § 300aa-7, a claimant is permitted to reject an award or decision rendered under the Act and then reinstitute a civil tort action. If this option is taken, 42 U.S.C. § 300aa-21(c) provides for a claimant to pursue civil remedies "within the period prescribed by limitations of actions under State law applicable to such actions." Significantly, the statute of limitations for a suit to be filed on Jessica's behalf as of this writing still has not run. This is because Jessica was born on May 31, 1978 and pursuant to 42 U.S.C. § 300aa-16(c) the statute of limitations was tolled for the period of time in which her petition was pending under the Act — which was a period in excess of four years.

Further, 42 U.S.C. § 300aa-22(e) titled "Preemption" states:

> No state may establish *or enforce* a law which prohibits an individual from bringing a civil action against the vaccine manufacturer for damages for a vaccine-related injury or death if such civil action is not barred by this part.
> (Emphasis added).

Petitioner's cause of action was not "barred by this part."

The opinion below seized exclusively upon the language of § 300aa-22(e) to the exclusion of all other provisions contained in the Act. Reading § 300aa-22(e) in isolation, the opinion below found the language of the section to be "susceptible to inconsistent interpretations as to whether the Act preempts state statutes of limitation." Rather than considering the Act as a whole and considering also the Act's

various provisions addressing limitations, dismissals, and post-election refiling, the opinion below looked instead to the legislative history associated with § 300aa-22(e). There is no need to resort to legislative history, however, when a statute is plain and unequivocal on its face. *Reid v. Department of Commerce*, 793 F.2d 277, 281 (Fed. Cir. 1986) *citing United States v. Oregon*, 366 U.S. 643, 648 (1961), *reh'g denied*, 368 U.S. 870 (1961). A court should resort to legislative history only if "a literal interpretation would lead to an incongruous result." *United States v. Bryan*, 339 U.S. 323, 338 (1950). Examples of incongruous results are where "a literal reading would impute to Congress an irrational purpose," *United States v. Bryan*, 339 U.S. 323, 338 (1950), where a literal reading would "thwart the obvious purposes of the statute," *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978), or where a literal reading would "lead to a result at variance with the policy of the legislation as a whole," *Trustee[s] of Indiana University v. United States*, 618 F.2d 736, 739 (1980). A literal reading of § 300aa-22(e) considered with the statute as a whole and also with § 300aa-11(a)(5)(A) (providing that dismissals are without prejudice) and § 300aa-16(c) (providing that state statutes of limitation are tolled while petitions filed pursuant to the Act are pending), leads to a conclusion that Congress intended to preempt state statutes of limitations that bar the post-election refiling of civil actions.

In direct contravention of the plain language contained in the Act the opinion below enforces a state law (*i.e.*, 735 ILCS 5/13-217) the application of which is not even implicated by the facts yet the effect of which prohibits petitioner from bringing her post-election civil action.

The Illinois statute, 735 ILCS 5/13-217, is correctly characterized in the opinion below as a "savings statute." As to the purpose of § 13-217, the opinion below quotes *Reyes v. Court of Claims of the State of Illinois*, __ Ill. App. 3d __, 702 N.E.2d 224, 230 (1998) for the proposition that it, "enumerates the circumstances under which the statute of limitations for certain actions *may be extended*." (emphasis added).

As to Jessica Evans, due to a combination of factors no statute of limitations has yet run. First, the date of her birth when considered with the fact that the statute of limitations was tolled for the period in which her petition in the United States Claims Court was pending, means that the statute of limitations has not yet run. Second, at all times relevant Jessica has been a disabled person.

Under such circumstances there is no basis to look to a savings statute designed to preserve or extend the limitations period. If the statute is not implicated then neither is the judicially-created "one refiling rule" engrafted to the statute by Illinois courts. Using the "one refiling rule" to deprive petitioner of her cause of action, in addition to being contrary to 42 U.S.C. § 300aa-22(e), is contrary to 42 U.S.C. § 300aa-21(c) since it has the effect of shortening the statute of limitations period, and is also contrary to 42 U.S.C. § 300aa-11(a)(5)(A) as it converts a dismissal granted *without prejudice* to a dismissal *with prejudice*.

Following proper statutory construction principles and reading the Act as a whole and considering the "communal existence" between the various sections, the plain language of the Act prohibits states from establishing or enforcing statutes of limitations that prohibit a petitioner from re-filing

a post-election civil action. Contrary to the conclusion reached in the opinion below, such a result is consistent with the purpose for which the National Childhood Vaccine Injury Act was created as it encourages persons to dismiss pending civil actions to pursue a remedy under the Act. The opinion below creates a chilling effect by adding uncertainty to the dismissal *without prejudice* language contained in § 300aa - 11(a)(5)(A) and it creates a disincentive to dismiss civil actions in favor of proceeding under the Act.

The opinion below must be reversed because it creates a result that is contrary to the plain express language of the Act.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW WEAKENS THE PRINCIPLE OF PREEMPTION AND IT IS CONTRARY TO THE PURPOSES FOR WHICH THE VACCINE INJURY COMPENSATION ACT WAS CREATED.

The petition for writ of certiorari should be granted because the opinion below failed to duly consider that, as this Court has held, a state rule may be preempted if it would, "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Felder v. Casey*, 487 U.S. 131, 138 (1988).

The provisions of the Act that are relevant to this cause clearly show the existence of a legislative scheme designed to encourage injured parties to seek their remedy through the Act without extinguishing their right to later pursue an alternative remedy through civil litigation. The interpretation

given to the relevant provisions of the Act by the opinion below not only deprives petitioner of a remedy, but further creates a disincentive for similarly situated injured parties to seek their remedy under the Act. The opinion below sends a clear message that while an injured party may elect to dismiss a pending civil action in order to pursue a claim under the Act, he or she does so at their peril since, if the opinion below is allowed to stand, the dismissal "may" or "may not" result in a dismissal *with prejudice*. Such an interpretation of the Act is contrary to the Act's express language — that dismissals are to be *without prejudice*. Such an interpretation of the Act was never intended by Congress. As such, the opinion below truly stands as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Felder v. Casey*, 487 U.S. 131, 138 (1988).

When Congress enacted the National Childhood Vaccine Injury Act it did so to encourage injured persons with preexisting unresolved claims to utilize the administrative process established under the Act. 42 U.S.C. § 300aa-10(a) In fact, the Act specifically provides, "it shall be the ethical obligation of attorneys to advise clients of the existence of the Vaccine Injury Compensation Program and to encourage their participation through the filing of a petition." 42 U.S.C. § 300aa-10(b).

To further encourage participation under the Act it is clear that Congress drafted the Act in such a way as to provide certain safeguards designed specifically to preserve civil causes of action in the event a claimant elected not to accept disposition on a petition filed under the Act. A clear example of this intent is shown by 42 U.S.C. § 300aa-11(a)(5)(A) (providing for dismissal of pending civil actions *without*

prejudice); 42 U.S.C. § 300aa-16(c) (tolling statutes of limitations during pendency of vaccine claims); and 42 U.S.C. § 300aa-17 (providing right to reject award under Act and reinstitute civil proceedings).

In addition to the above provisions, Congress felt so strongly about preserving an injured party's right to bring a civil action that it included a preemption clause expressly preempting states from "establishing or enforcing" laws which would prevent bringing a civil action. 42 U.S.C. § 300aa-22(e).

It is clear that Congress crafted the Act to pull in as many persons as possible under the Act. For persons like petitioner, who were already involved in civil actions, Congress could not within constitutional limits apply the Act retroactively to deprive them from continuing their civil actions. Instead Congress sought to create an incentive for such persons to voluntarily dismiss their civil actions and seek a remedy under the Act. The incentive was the dismissal *without prejudice* expressly provided for in § 300aa-11(a)(5)(A). To accomplish this purpose the language of § 300aa-11(a)(5)(A) must be given broad effect. By contrast the opinion below means a plaintiff "may" obtain a voluntary dismissal but it "may" or "may not be" *without prejudice* depending upon the circumstances. The uncertainty which obtains from such an interpretation will surely not encourage plaintiffs to dismiss their pending civil actions to pursue remedies under the Act. Indeed, the Magistrate whose "Report and Recommendation" was rejected by the opinion below recognized that, "[e]nforcement of the Illinois statute with the one refiling rule interpretation would defeat the plan Congress established."

In addition to the plain language of the Act and the express preemption clause, the opinion below fails to duly consider the principles conflict preemption.

Conflict preemption occurs under circumstances where it is impossible to comply with both federal and state law or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress as manifested in the language, structure, and underlying goals of the federal statute at issue. *American Agriculture Movement v. Board of Trade*, 977 F.2d 1147 (7th Cir. 1992) Applying 735 ILCS 5/13-217 stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress as expressed in the National Childhood Vaccine Injury Act because it creates a disincentive to seek a remedy under the Act.

The Act contains an express preemption clause that the opinion below disregards. In addition, the opinion below is contrary to the principles of conflict preemption. Preemption is vital to the proper functioning of our system of governance. The opinion below cannot be allowed to stand because it undermines what Congress intended when it created the National Childhood Vaccine Injury Act and it weakens the principles of preemption.

CONCLUSION

The opinion below converts the statutorily mandated dismissal *without prejudice* to a dismissal *with prejudice* and in so doing contravenes the express language of the Act and frustrates the clear intent Congress had and objectives it sought to achieve in enacting the Act. The proper construction of the National Childhood Vaccine Injury Act is an important question of federal law that should be settled by this Court.

Accordingly, Kathleen Evans, as Conservator of Jessica Evans, a protected person, respectfully requests that the petition for writ of certiorari be granted.

Respectfully submitted,

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